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In the Supreme Court of the United States

OCTOBER TERM, 1971

JON RICHARD ARGERSINGER, PETITIONER

v.

RAYMOND HAMLIN, SHERIFF, LEON COUNTY, FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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After hearing argument in this case on December 6, 1971, the Court, on December 20, 1971, ordered re-argument and invited the Solicitor General to express the views of the United States. This brief is submitted in response to that request.

STATEMENT

This case arose out of an original habeas corpus action filed in the Florida Supreme Court (A. 1).[1]

On January 13, 1970, petitioner pleaded guilty to carrying a concealed weapon—brass knuckles— in violation of § 790.01(1), Fla. Stat., as amended, 1969, Laws of Florida (A. 4–5). That statute provides for punishment by a penalty of imprisonment for not less than

[1] "A." refers to the Joint Appendix filed in this Court.

three months nor more than six months or by a fine of not less than $500 nor exceeding $1,000, or by both fine and imprisonment (A. 5). Petitioner was sentenced "to pay a fine of $500, and in default of the payment of such fine and costs, to be imprisoned in the county jail [at hard labor] for a period of three months" (A. 4–5). Six days later, on January 19, 1970, petitioner was ordered committed to the county jail pursuant to the judgment (A. 7).

The following day petitioner, acting through an attorney, filed a habeas corpus action in the Supreme Court of Florida. He claimed that he was indigent at the time of his conviction, that he was unrepresented by counsel though he had not waived the assistance of counsel, and that he had a defense to the charges that he was unable as an indigent layman properly to raise and present (A. 1–2). After releasing petitioner on bail (A. 4) and hearing argument, the Florida Supreme Court, on June 3, 1970, discharged the writ (A. 8–11). Holding that an indigent defendant accused of a misdemeanor is entitled to court-appointed counsel only when the offense carries a possible penalty of more than six months' imprisonment, it ruled that petitioner was not entitled to relief since the maximum term of imprisonment provided by the statute under which he was convicted was six months, and petitioner was actually sentenced to three months.[2]

[2] The decision of the Florida Supreme Court antedated this Court's decisions in *Williams* v. *Illinois*, 399 U.S. 235, *Morris* v. *Schoonfield*, 399 U.S. 508, and *Tate* v. *Short*, 401 U.S. 395. No issue was raised below of the power of the state to imprison petitioner at hard labor for nonpayment of the fine. The constitutional status of petitioner's alternative sentence of

SUMMARY OF ARGUMENT

Nothing in the language or reasoning of *Gideon* v. *Wainwright,* 372 U.S. 335—which holds that the assistance of counsel is fundamental to a fair criminal trial and, therefore, that states must afford counsel to indigents under the Fourteenth Amendment—limits the scope of that decision to felonies. Since there is no sound reason for interpreting the Sixth Amendment to be less generous to defendants in granting assistance of counsel than a jury trial, the right of indigents to appointed counsel must, after *Duncan* v. *Louisiana,* 391 U.S. 145, and *Baldwin* v. *New York,* 399 U.S. 66, extend at least to all cases involving a possible sentence of imprisonment of more than six months.

We agree with petitioner that the right to assistance of counsel extends further, to all cases in which an indigent defendant may be deprived of his liberty. Since other Sixth Amendment rights, such as the right of confrontation and right to a speedy and public trial, plainly are applicable to offenses not involving more than six months imprisonment, there is no barrier to such a holding with respect to appointed counsel, whether the right is derived from the Sixth Amendment, or the Fifth and Fourteenth Amendment requirements of "due process." In earlier decisions extending the right to counsel, such as *Powell* v. *Alabama,* 287 U.S. 45, and *Johnson* v. *Zerbst,* 304 U.S.

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imprisonment under those decisions is not clearly settled, since petitioner's term of imprisonment was less than the maximum that could have been imposed for the offense. Compare *Williams* and *Tate*, with Mr. Justice White's concurring opinion in *Morris*, 399 U.S. at 509.

458, the Court has not limited the right to the scope contemplated by the Framers of the Constitution, but has looked rather to the fundamental character of the assistance of counsel to a fair trial. Since there is little doubt that counsel's aid may be highly valuable in respect to petty offenses, and deprivation of liberty, for whatever length, is regarded by society as a very serious penalty, indigents who may be subjected to that penalty should, as a constitutional right, have the opportunity to be assisted by counsel. Since fines, however, have an effect like other exactions and determinations with financial consequences which the state makes in nonjudicial settings with no right to appointed counsel, see, *e.g. Goldberg* v. *Kelly,* 397 U.S. 254, 270, and since even those who can afford to do so commonly do not employ counsel when the only likely penalty is a fine, the constitutional right to appointed counsel should not extend to petty offenses when only a fine is imposed.

If the right to appointed counsel were formulated in terms of all offenses for which imprisonment is authorized by statute, it would apply in many cases where imprisonment is not a realistic possibility. A right drawn in terms of likelihood of imprisonment viewed before the trial would not protect the defendant who "unexpectedly" receives a prison sentence, and would necessitate drawing an arbitrary line distinguishing degrees of "likelihood." Therefore, the right should be phrased to be applicable when the actual sentence is one of imprisonment, an approach parallel to that taken by the Court with respect to jury trial in criminal contempt cases. See, *e.g., Bloom* v. *Illinois,* 391 U.S. 194.

If the prosecutor or judge thinks there is any chance of a sentence of imprisonment, an indigent accused should be informed of his right to appointed counsel before pleading guilty or being tried.

Although the right to appointed counsel suggested here would go beyond what is now required under federal law, counsel is now provided in many petty offense cases and the applicable statute, 18 U.S.C. 3006A, is framed to accommodate an expanded constitutional right to appointed counsel. We are reasonably confident that the federal system could adjust to this right without great difficulty.

It is more difficult to estimate the likely effect on fifty different states. The recommendations of the American Bar Association and the President's Commission on Law Enforcement and Administration of Justice in favor of providing counsel in essentially the same circumstances urged here suggest that it could be practically implemented. The experience of states that already afford such a right, the simplicity of the issues in many petty offense cases, the high rate of guilty pleas, the ability of the states to comply with other expansions of the right to counsel, and the burgeoning number of attorneys in the country all point in the same direction. While we are concerned with the possibility that in some jurisdictions there may not be sufficient resources allocated to permit representation of the highest quality, we do not think that is a reason for withholding from indigents a valuable right which should otherwise be afforded.

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ARGUMENT

THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION REQUIRE THAT AN INDIGENT DEFENDANT NOT BE DEPRIVED OF LIBERTY WITHOUT HAVING BEEN AFFORDED APPOINTED COUNSEL

In 1963, in *Gideon* v. *Wainwright,* 372 U.S. 335, this Court held that the provision of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy the right to counsel is fundamental and essential to a fair trial and is therefore obligatory on the states under the due process requirement of the Fourteenth Amendment. In so ruling, this Court rejected the test adopted in *Betts* v. *Brady,* 316 U.S. 455, 462, under which "an appraisal of the totality of facts in a given case" was made to determine if appointment of counsel was necessary in state cases.

A. THE RIGHT TO APPOINTED COUNSEL WHEN AN INDIGENT MAY BE SENTENCED TO IMPRISONMENT FOR MORE THAN SIX MONTHS

Although, in passing, this Court has referred to *Gideon* as establishing "an absolute right to appointment of counsel in felony cases," *Mempa* v. *Rhay,* 389 U.S. 128 at 134, it has not held that the right does not extend to other cases. Nothing in the Sixth Amendment nor in the language or reasoning in *Gideon* would limit its holding to felonies. The United States agrees with both parties in this case that the rule of *Gideon* is not limited to felony cases.

This conclusion is a corollary of this Court's decision in *Duncan* v. *Louisiana,* 391 U.S. 145, that under the Sixth Amendment and Article 3, § 2 of the Constitution, the right to a jury trial for a serious offense,

whether categorized as a felony or misdemeanor, is fundamental and must under the Fourteenth Amendment be granted by the states. Instead of drawing a line between felonies and misdemeanors, the Court in *Duncan* drew one between serious offenses and petty offenses, indicating that jury trials need not be provided for the latter. It did not "settle in this case the exact location of the line between petty offenses and serious crimes" (*id.* at 161) [3]; though as one standard for distinguishing between these kinds of offenses it mentioned 18 U.S.C. 1, which for federal jurisdictions defines petty offenses as those punishable by no more than six months in prison and a $500 fine. In *Baldwin* v. *New York,* 399 U.S. 66, the Court definitely settled that a person charged with a crime where the possible penalty exceeds six months has a right to a trial by jury, even if the crime is a misdemeanor under state law.

Given the right to a jury trial for all cases involving a possible sentence of more than six months, the right to counsel under the Sixth and Fourteenth Amendments must extend at least to those cases.[4] There is no sound theoretical reason for interpreting the Sixth Amendment to be less generous to defendants in granting assistance of counsel than jury trial,

[3] See generally Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 Harv. L. Rev. 917 (1926).

[4] We do not think extended discussion of this point, on which the parties and the court below agree, is necessary; the discussion in the remainder of the brief, suggesting that the right to appointed counsel is more extensive than the right to a jury trial is, of course, also relevant to our position that it is at least as extensive.

particularly in light of this Court's consistent position that the right to counsel is fundamental. See, *e.g.*, *Powell* v. *Alabama*, 287 U.S. 45; *Johnson* v. *Zerbst*, 304 U.S. 458; *Gideon* v. *Wainwright*, 372 U.S. 335. Practically, in light of the complexities of proceedings before a jury, the jury trial right would be of relatively little value without the guiding hand of counsel.

B. THE RIGHT TO APPOINTED COUNSEL WHEN AN INDIGENT MAY BE SENTENCED TO IMPRISONMENT FOR LESS THAN SIX MONTHS

We agree with petitioner, however, that the constitutional right to the assistance of counsel is not coextensive with the right to a jury trial but reaches further—to all cases in which an indigent defendant may be deprived of his liberty. We recognize that this position is not without some theoretical and practical difficulties, but we suggest that it represents a sounder interpretation of the Constitution than any other, and that it would not impose an unjustified or unmanageable burden on the bar or the courts.

Before developing in more detail the reasons that underlie this position, we consider and reject certain arguments that it would be inappropriate for this Court to hold that the Constitution guarantees a right to counsel whenever a person may be sentenced to imprisonment. Florida argues that since the rights to counsel and jury trial are both contained in the Sixth Amendment and it applies to "all criminal prosecutions," whatever cases are encompassed within the phrase "all criminal prosecutions" must be the same for the right to counsel as they are for the right to a jury trial. (Brief for Respondent 12–13). There is

much weight in this argument, but in response it may be said that the position is unduly literalistic and inconsistent with existing constitutional law. The constitutional term "criminal prosecutions" need not have a fixed and uniform meaning independent of the particular right asserted (cf. *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 433), which necessarily defines the boundaries of the cases to which a claimed right applies. In addition to the right to counsel and the right to jury trial, the Sixth Amendment contains a number of other rights, such as the right of confrontation and the right to a public and speedy trial. These are applicable to prosecutions for petty offenses as well as major offenses. See, *e.g., District of Columbia* v. *Clawans,* 300 U.S. 617; *In re Oliver,* 333 U.S. 257. It is perhaps a nice doctrinal question whether the undoubted applicability of those rights to charges for petty offenses is a direct consequence of the Sixth Amendment, in which event "criminal prosecutions" would refer to somewhat variant classes of cases depending on the Sixth Amendment right involved, or whether those rights are applicable to petty offenses because of the commands of the Fifth and Fourteenth Amendments that no person be deprived of "life, liberty, or property, without due process of law" See *Cooke* v. *United States,* 267 U.S. 517. The essential point, however, is that the rejection of a Sixth Amendment right to a jury trial for offenses involving a possibility of imprisonment for less than six months in no way compels the conclusion that there is no right on the part of indigents to have appointed counsel in such cases.

Indeed the opinions in *Duncan* v. *Louisiana*, 391 U.S. 145, and *Baldwin* v. *New York*, 399 U.S. 66, did not rest finally on some fixed definition of "criminal prosecutions" but upon the necessity of accommodating the desirability of community participation in determinations of criminal guilt with the need for effective judicial administration. In *Duncan*, the Court said:

> * * * the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. * * * [391 U.S. at 161.]

And in *Baldwin* the Court referred to the *Duncan* holding as follows:

> Where the accused cannot possibly face more than six months' imprisonment, we have held that * * * disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications. [399 U.S. at 73.]

The court, in *Duncan*, did make reference to historical practice in delimiting the boundaries of the jury trial right (391 U.S. 151–154) but that was only one element of its approach; with respect to the right to counsel, the Court, explicitly or implicitly, has consistently declined to confine the right to its historical content at the time of the adoption of the Constitution. The holding in *Powell* v. *Alabama*, 287 U.S. 45, that indigents in some circumstances are entitled to appointed counsel rests on an assessment of the necessities for a fair

hearing, not on a showing that due process was in 1789 understood to include a right to appointed counsel. In *Johnson* v. *Zerbst,* 304 U.S., 458, the Court established the Sixth Amendment right to appointed counsel, despite the absence of historical evidence that the Framers intended such a right.[5] More recent decisions such as *Hamilton* v. *Alabama,* 368 U.S. 52, *Escobedo* v. *Illinois,* 378 U.S. 478, *Miranda* v. *Arizona,* 384 U.S. 436, *United States* v. *Wade,* 388 U.S. 218, and *Mempa* v. *Rhay,* 389 U.S. 128, clearly do not depend on analysis of the historical content of the right to counsel. It is thus consistent both with the decisions on jury trial and with the development of the right of counsel for this Court to determine the boundaries of the cases to which that right applies on the basis of a sensitive assessment of the necessary prerequisites for a fair trial in light of the need for efficient administration of criminal justice. Under such an approach, we suggest that the assistance of counsel must be supplied to indigents who wish it if they are to be sentenced to imprisonment.

The decisions of this Court establish that the right to counsel is one of the fundamental elements of a fair criminal trial. As this Court said many years ago in *Powell* v. *Alabama,* 287 U. S. 45, 68–69:

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would

[5] The materials summarized in Beaney, *The Right to Counsel in American Courts*, pp. 27–30, suggest rather strongly that a constitutional right to appointed counsel was not contemplated.

> be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. * * *

While the elements of proof for petty offenses may often be simpler than those for more serious offenses, there is little reason to doubt that counsel can be of great help for those charged with petty offenses. Although exhaustive statistics have not been compiled, study suggests that a significantly higher percentage of defendants with counsel receive favorable dispositions in petty offense cases than those without counsel. (See App. A to Brief of the Legal Aid Society of New York). In some instances important and complex issues of constitutional law are involved in conviction for petty offenses (see, *e.g.*, *Thompson* v. *Louisville*, 362 U.S. 199; *Powell* v. *Texas*, 392 U. S. 514). It may require special efforts by counsel to raise and pursue these claims; certainly they would not occur to unin-

formed laymen. Even with respect to more routine cases, counsel may be important to ensure fairness. The Task Force Report on *Drunkenness* of the President's Commission on Law Enforcement and Administration of Justice, pp. 3–4, commented that, "One major reason" why "[t]he handling of drunkenness cases in court hardly reflects the standards of fairness that are the basis of our system of criminal justice" "is that counsel is rarely present."[6] Similar conclusions have been reached about the processing of vagrancy and loitering charges. See *e.g.*, Foote, *Vagrancy-Type Law And Its Administration,* 104 U. Pa. L. Rev. 603 (1956).

The right to counsel is thus significantly different from the right to trial by jury. Although the principle of community participation in determinations of guilt is important, it is possible to have a fair trial before a judge alone. But a trial, whether before a judge, or judge and jury, is an adversary proceeding, and the right to counsel affects what either judge alone, or judge and jury, will hear. The risk of an unfair trial in an adversary proceeding where the defendant by reason of poverty is deprived of counsel can be as great in a trial before a judge alone as in a trial before a jury. Moreover, a crucial step in the criminal process is the decision of the accused whether or not to plead guilty, and it is difficult to make an informed decision without the advice of counsel. As

[6] In 1965 there were two million arrests for public drunkenness, one-third of the total arrests (Task Force Report on *Drunkenness*, p. 1); although many of those arrested are not tried or convicted (*id.* at pp. 2–3), clearly public drunkenness is one of the most frequently prosecuted petty offenses.

Mr. Justice Harlan put it, "The Court has held, properly I think, that in an adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel * * *" (*Duncan* v. *Louisiana,* 391 U.S. 145, 187 (dissenting)).

In *Powell* v. *Alabama,* the Court wrote, "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense" (287 U.S. at 69). With very narrow exceptions, including grand jury proceedings and certain kinds of administrative inquiries (*In re Groban,* 352 U.S. 330), the right to appear by counsel of one's choice in every kind of legal action is well established (see, *e.g., Goldberg* v. *Kelley,* 397 U.S. 254, 270–271) and obviously it encompasses petty criminal prosecutions. We do not suggest that there is a constitutional right to appointed counsel in every instance in which there is a constitutional right to appear by counsel of one's choice. (Even those who can afford to do so often do not employ counsel for matters of less than crucial importance, since they must weigh the prospective cost of hiring counsel against the likely benefit of his services; it would be an unworkable and unsound rule to afford indigents free counsel, as a constitutional right, for every matter with respect to which a nonindigent might employ counsel at a cost.) But we do suggest that when something as crucial is at stake as a deprivation of liberty, pursuant to a

criminal conviction, it is unconstitutional to leave indigents who want the assistance of counsel unaided by counsel.

As this Court said in *Baldwin* v. *New York,* "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation" (399 U.S. 66, 73). The seriousness with which a penalty is regarded may be difficult to establish by simple empirical data; but we suggest that the Court can appropriately notice that imprisonment of any duration is generally considered a serious penalty. With the single exception of civil contempt,[7] persons are not imprisoned unless convicted of criminal acts or held pending trial for criminal acts. This is one indication of how gravely imprisonment is regarded by society. It would be thought extraordinary for someone facing imprisonment who could afford counsel to decline to seek counsel's aid because he considered the penalty not serious enough to justify the cost. This is another indication of how the penalty is viewed and perhaps one particularly relevant to this case. Imprisonment, unlike a fine, involves a complete disruption of normal life, separation from family and friends, absence from employment and very frequently loss of job.

Even if we considered imprisonment for a few days to be less grave than this discussion indicates, we

[7] The person confined civilly, unlike the convicted criminal, can gain release by performing what the court has ordered, and thus purging himself of the contempt. He carries "the keys of [his] prison in [his] own pocket" (*Shillitani* v. *United States*, 384 U.S. 364, 368).

would suggest that certainly four or five months imprisonment is too severe a penalty to impose on an indigent who lacks the opportunity to have the assistance of counsel; and if there is to be a constitutional right to counsel in such cases, we perceive no place to draw the line short of holding that the right exists when imprisonment of any length is involved.[8]

We think the Court may also take notice that most fines, particularly those typically imposed for petty offenses, are not regarded as seriously as imprisonment by most persons. It is a rare case in which a person with an alternative of a fine or jail sentence willingly chooses imprisonment. In their effect, fines are not essentially different from other financial executions imposed on individuals by the state through noncriminal processes. When persons charged with petty offenses do not expect imprisonment, it is not at all unusual for them to act without counsel, even though they could comfortably afford to hire counsel. See Junker, *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685, 713–714 (1968).

The principle that indigents who face imprisonment should have a right to the assistance of counsel is implied not only by the import of *Gideon* v. *Wainwright,* 372 U.S. 335, and *In re Gault*, 387 U.S. 1, which focus on the intrinsic importance of counsel to a fair trial, but also by cases employing an equal pro-

[8] The line between more than six months' and less than six months' imprisonment is based largely on history and present practice in most jurisdictions, see, *e.g.*, *Baldwin* v. *New York*, 399 U.S. 66, but that line is inappropriate for the right to counsel, and there is no other short of that between different terms of imprisonment that does not seem arbitrary.

tection analysis, which indicate that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois,* 351 U.S. 12, 19 (plurality opinion of Black, J.). See *Douglas* v. *California,* 372 U.S. 353, and *Miranda* v. *Arizona,* 384 U.S. 436, applying that essential concept to a right to counsel. Affording an indigent who faces imprisonment the opportunity to have counsel has been urged by the American Bar Association, in its Minimum Standards for Criminal Justice, *Providing Defense Services,* Section 4.1:

> Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors, or otherwise.

And in slightly different language the President's Commission on Law Enforcement and Administration of Justice recommended that:

> The objective to be met as quickly as possible is to provide counsel to every criminal defendant who faces a significant penalty, if he cannot afford to provide counsel himself. This should apply to cases classified as misdemeanors as well as those classified as felonies. * * * The immediate minimum, until it becomes possible to provide the foregoing, is that all defendants who are in danger of substantial loss of liberty shall be provided with counsel. [*The Challenge of Crime in A Free Society,* p. 150.]

Such thoughtful conclusions do not, of course, establish a rule of constitutional law, but they do reflect

a persuasive assessment of the importance of loss of liberty and estimation of the standards for minimal fairness in the criminal process. They thus lend strong support to a constitutional principle drawn from *Gideon, Griffin, Douglas* and *Gault*. In *Gault*, the Court, considering juvenile delinquency proceedings, formulated a right very close to that suggested here; holding that juveniles have a constitutional right to appointed counsel in "proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed." 387 U.S. at 41.

As we have indicated earlier, we do not think that these cases or the principle urged would require the government to supply counsel to indigents in every petty offense proceeding in which a person has a right to appear by counsel of his choice. Since the state imposes exactions, and makes other determinations with financial consequences much more serious than the typical fine for a petty offense, in nonjudicial settings and with no right to appointed counsel (*e.g., Goldberg* v. *Kelly*, 397 U.S. 254, 270), we suggest that neither the Sixth nor the Fifth Amendment guarantees indigents a right to counsel for petty offenses when imprisonment is not imposed.[9]

[9] Conceivably there might be extraordinary circumstances in which the collateral consequences of a conviction not involving imprisonment were so severe that a right to appointed counsel might arguably exist either prior to the conviction itself or before the consequences could attach (cf. *Mayer* v. *City of Chicago*, No. 70–5040, decided December 13, 1971) but that possibility is not one the Court need consider to decide this case.

Despite the argument developed thus far, we recognize that a right to appointed counsel must depend in part on the possibility that counsel can in fact be afforded. However appealing, the argument for counsel must be rejected if it is impossible for the courts and the bar to provide counsel. In a subsequent section, we consider in more detail the practical implications of the position urged here, focusing particularly on the federal system, but we note at this point that supplying counsel may well be less complicated and expensive for society than providing a jury trial and that the relevant facts in most petty offense cases are simpler than those in more serious crimes, and adequate representation for the former would ordinarily be less time-consuming than adequate representation for the latter. Before further discussing the practical aspects of an expanded right to appointed counsel, we turn to a related and troubling aspect of the problem, the precise scope of the right urged here.

C. FORMULATION OF THE RIGHT

If legislatures had conveniently provided that less serious petty offenses could be punished only by fines, and had reserved imprisonment for those offenses for which imprisonment is the common penalty, indigents charged with the latter offenses would have to be offered counsel. Typically, however, legislatures have provided the possibility of imprisonment upon conviction of petty offenses for which that penalty is very rarely imposed. For example, in New York City in 1969 less than 40 of 1,800,000 persons convicted of jaywalking, speeding, and certain other traffic viola-

tions were incarcerated or given a suspended sentence. Criminal Court of the City of New York, Annual Report of 1969, p. 13, Table 3, line 11.

With respect to the right to a jury trial for crimes defined by statute, this Court has focused on the maximum authorized penalty (see *e.g., Duncan* v. Louisiana, *supra*) : in this area that approach might require appointment of counsel in a vast number of cases in which the possibility of imprisonment is exceedingly remote. As a consequence, a somewhat more flexible standard is required, one similar to that governing jury trial for criminal contempt (*e.g., Cheff* v. *Schnackenberg*, 384 U.S. 373; *Bloom* v. *Illinois*, 391 U.S. 194), that rests on the actual penalty imposed. The constitutional right we suggest is that no one can be imprisoned for a petty offense without being informed that he has a right to counsel, which includes a right to have appointed counsel if he is indigent. Although this Court need not now resolve every conceivable question raised by this standard, we deem it desirable to explore this and alternative formulations sufficiently to show that it is a viable constitutional standard and preferable to possible alternatives.

There are three basic alternatives, assuming acceptance of the underlying principle of a right to appointed counsel for persons facing imprisonment. One is to require appointment on behalf of an indigent who wishes counsel whenever the statute authorizes imprisonment. That approach would mean appointment even for offenses in which imprisonment is not a realistic possibility and for which most persons who can afford counsel do not appear by counsel. A second alterna-

tive, that chosen by the American Bar Association,[10] is to require appointment in respect to offenses likely to result in imprisonment. One difficulty with making the right to counsel turn on the likelihood of imprisonment, viewed before a plea of guilty or trial, is that it would not protect the accused who "unexpectedly" receives an infrequently imposed sentence of imprisonment. It may be precisely in such situations of defendants singled out for unusually severe penalties that counsel would have been most useful. In any event, if it is unconstitutional to allow someone to be imprisoned without counsel when that is "foreseen," it can not be constitutional to allow imprisonment when it is "unforeseen." This difficulty with a "likelihood" standard could be rectified by making the right turn on either "likelihood" or actual sentence, but

[10] In its commentary, Minimum Standards for Criminal Justice, *Providing Defense Services*, p. 40, the Bar Association stated:

> As a matter of sound judicial administration it is preferable to disregard the characterization of the offense as felony, misdemeanor or traffic offense. Nor is it adequate to require the provision of defense services for all offenses which carry a sentence to jail or prison. Often, as a practical matter, such sentences are rarely if ever imposed for certain types of offenses, so that for all intents and purposes the punishment they carry is at most a fine. Thus, the standard seeks to distinguish those classes of cases in which there is real likelihood that incarceration may follow conviction from those types in which there is no such likelihood. It should be noted that the standard does not recommend a determination of the need for counsel in terms of the facts of each particular case; it draws a categorical line at those *types* of offenses for which incarceration as a punishment is a practical possibility. *Cf.* Williams v. Commonwealth, 216 N.E.2d 779 (Mass. 1966).

there is another less solvable problem. The assumption of a "likelihood" approach is that if imprisonment is reasonably likely, viewed prospectively, then there is a right to appointed counsel for indigents. If that were the constitutional standard, a failure to appoint counsel would be unconstitutional even if imprisonment were in fact not imposed. The constitutional right would rest, then, on the percentage of cases within the class for which an accused is prosecuted in which imprisonment results. Although as a matter of legislation or administration, such an approach may be sound, we do not understand how this Court would draw the line at which the percentage is "high enough" for the right to counsel to attach, nor do we think such a line would have a sound basis in constitutional principle.[11]

Focus on the actual sentence imposed is similar to the approach taken for jury trial in criminal contempt cases and avoids the difficulties of the two alternatives. In a case in which a prosecutor or a judge believed at the outset there was any likelihood of a sentence of imprisonment, the accused would be informed of his right to counsel and to have counsel appointed if he is indigent.[12] No sentence of imprison-

[11] This would be quite different from a line drawn between terms of maximum authorized penalty, see *Duncan* v. *Louisiana*, *supra*, and *Baldwin* v. *New York*, *supra*, which derives from the historical definition and treatment of different classes of crimes and does not require the Court to draw an essentially arbitrary mathematical line.

[12] Although such an approach would give the prosecutor some power over whether a sentence of imprisonment were imposed, he already has very great practical power in this respect by deciding whether to charge a person and what crime

ment could be imposed in the absence of such a warning to an accused,[13] at least without another trial.[14] A state could avoid the complexity of predicting a likely sentence by providing an opportunity for counsel in all cases where imprisonment is now authorized, or by redefining petty offenses so that with

to charge, and in recommending a sentence to the judge, either after a plea bargain or in other circumstances. The effective setting of a maximum sentence by an initial determination of what procedure to follow would not be novel since that occurs in any criminal contempt case tried without a jury.

[13] In order to avoid a problem of reverse discrimination, the warning of possible imprisonment presumably would also have to be given to nonindigents, so that they could make their decision whether to hire counsel with the same information as an indigent would have.

[14] There might be rare cases, presumably among those going to trial rather than resulting in guilty pleas, in which the facts as developed would suggest to the judge the appropriateness of a prison sentence he had thought not at all likely at the beginning of trial. Such cases could be reduced to a bare minimum if all initial doubts in the first instance about likely sentence were resolved in favor of granting counsel. If a state wished to provide that a judge could impose imprisonment even though an opportunity for counsel had not been afforded, that might be constitutional if the defendant were entitled to a trial *de novo* with counsel. Some problems with such a procedure would be that if the second trial were before the same judge, he might no longer be openminded about the case; and the prosecutor might make use of evidence coming out at the first trial because defendant was uncounseled. But these difficulties might not render the procedure itself unconstitutional. Such a procedure probably would not offend the prohibition against double jeopardy, because the second trial would be held at the request of a convicted defendant. A very similar procedure exists in states which provide an initial trial for certain misdemeanors before a justice of the peace who may be a layman and grant a right to trial *de novo* before a legally trained judge in a court of record. See, *e.g.*, Mississippi Code of 1942, as amended, §§ 1202, 1617. But cf. *Callan* v. *Wilson*, 127 U.S. 540.

respect to offenses rarely involving imprisonment the conditions of aggravation under which imprisonment would be appropriate would be legislatively determined. But even if jurisdictions did not take these steps, a constitutional rule which turned on the actual sentence imposed[15] would be workable. In practical effect, it would probably not be very different from the "likelihood" approach, since the initial determination by prosecutor and judge whether imprisonment might be imposed would typically turn on the usual treatment of similar offenses, but would be constitutionally more sound.

D. EFFECT ON THE FEDERAL SYSTEM

It is impossible to ascertain the precise effect on the courts and the bar of a rule that an indigent has a constitutional right to the assistance of counsel before being sentenced to prison. We are persuaded, however, that the need for counsel that such a principle would entail can be met, and that whatever burden is likely to be imposed is outweighed by the reasons that underlie the establishment of the right to counsel.

We begin with a discussion of the federal system. Federal courts have three different sorts of jurisdiction over petty offenses. In areas such as the District of Columbia, where the local law is federal, petty offenses cover much the same range of behavior as in most municipalities, including disorderly conduct,

[15] An exception might be crimes so serious the maximum authorized penalty was more than six months. Under *Baldwin* v. *New York*, *supra*, counsel well might be required in such cases even in the absence of an actual sentence of imprisonment.

gambling, prostitution, liquor offenses, violations of business, health, and building codes, and traffic offenses. See, *e.g.*, 40 D.C. Code §§ 104, 301, 605 and 609 (traffic offenses); 22 D. C. Code 1121 (disorderly conduct) and 25 D. C. Code 128 (drinking alcoholic beverages on street). Other federal courts enforce local state law under the Assimilative Crimes Statute, 18 U.S.C. 13. Finally there are petty offenses in the United States Code applicable to the entire country. These are defined as "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both" (18 U.S.C. 1), and include such widely diverse offenses as temporarily landing in the United States without proper authorization (8 U.S.C. 1282), shipping fruits or vegetables in barrels of less than standard capacity (15 U.S.C. 235), and using the Swiss Confederation coat of arms for commercial purposes (18 U.S.C. 708).[16] Although we believe that the great majority of petty offenses tried in the federal judicial system are traffic offenses and park violations, essentially similar to the kinds of offenses tried by state courts, there are no accurate statistics on the subject.[17] Having directed a

[16] A complete list of petty offenses was compiled by the Administrative Office of the United States Courts in 1966. See also Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on S. 3475, 89th Cong., 2d Sess., and on S. 945, 90th Cong., 1st Sess., pp. 284–305.

[17] Immigration cases probably constitute less then 5 per cent of federal petty offenses, but are the largest category of uniquely national violations. Since imprisonment is much more frequently imposed with respect to these than traffic and park violations, they make up a considerably higher proportion of the offenses for which imprisonment results.

study of the operation of the Criminal Justice Act of 1964, Professor Dallin Oaks informed the Senate Judiciary Committee in 1969 (Hearings on S. 1461, 91st Cong., 1st Sess., p. 329):

> So far as we are aware, there are no statistics on the number and type of petty offenses in the Federal courts. The category unquestionably includes an assortment of offenses that are handled on the state level by police or traffic courts. On the basis of our observation and the impressions of those with whom we have discussed the matter, we are of the opinion that a very high proportion of the petty offenses being heard in the Federal judicial system, perhaps as high as 90 percent, are traffic violations for which the penalty is a fine only. Most are heard by commissioners. For example, the U.S. commissioner in San Francisco estimates that his office has approximately 55 such cases per week, almost all relating to offenses committed at the Presidio or Treasure Island, two major military installations within his jurisdiction. Similarly, District of Columbia traffic tickets are all processed as petty offenses. Finally, we have the impression that almost all defendants throughout the Federal system undergo petty offense proceedings without the benefit of counsel, and this presumably includes many defendants who could afford counsel. * * *

Under 18 U.S.C. 3006A, a "person financially unable to obtain adequate representation" has a right to appointed counsel compensated by the government for all felonies and misdemeanors other than petty offenses and for a case in which "the Sixth Amendment to the Constitution requires the appointment

of counsel or * * * in a case in which [the accused] faces loss of liberty, any Federal law requires the appointment of counsel." The Act, in many respects, is generous in the representation it directs the courts to provide, reaching persons charged with violations of probation or parole or in custody as material witnesses and including not only counsel but investigative, expert and other services necessary to an adequate defense. Although the Act does not require the provision of compensated counsel for petty offenses, the open-ended subsection governing cases controlled by the Sixth Amendment, passed in 1970 (P.L. 91–447, 84 Stat. 916), reflects congressional awareness of the possible development of a right to appointed counsel for those offenses, and is designed to accommodate any such development within the statutory scheme.

Rule 44(a) of the Federal Rules of Criminal Procedure already provides that "[e]very defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him * * *." [18] As the Advisory Committee Note to the 1966 amendments recognized, this rule is broader than the statutory right to counsel created by Congress. Since a person accused of a petty offense has a right to be tried in the district court, see Rule 3 of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, 400 U.S. 1037, 1038, he has a right to appointed counsel if he chooses that course. If he chooses to be

[18] These rules do not apply to proceedings under 18 U.S.C. 3401, 3402, relating to petty offenses on federal reservations. Rule 54(b)(4), Fed. R. Crim. P. or to cases tried before magistrates.

tried by the magistrate, he has a "right to counsel," Rule 3, but no provision is made for appointed counsel. Some of the Federal Public Defender officers now assist in a considerable number of petty offense cases; they indicate informally that the added burden is not significant and that in some of the cases, on the basis of rather brief contacts, they have given legal assistance of great value. Rule 44 of the Rules of Criminal Procedure for the Superior Court of the District of Columbia, which tries petty offenses there, follows the federal rule providing for assignment of counsel in all cases; since the Public Defender can represent only those punishable by more than six months' imprisonment, 2 D.C. Code 2222 (Supp. IV, 1971), assignment in other cases must be of private attorneys.

Given the extent of the right of appointed counsel that already exists in the federal system, legislation which is framed to accommodate a right expanded to petty offenses, the manageable number of petty offenses (probably in the range of a few hundred thousand annually) tried in the federal courts, and the much smaller number for which imprisonment is a realistic possibility, we are reasonably confident that these courts could adjust to the constitutional principle urged here without great difficulty.

E. EFFECT ON THE STATES

It is harder to assess with any degree of precision the impact of that principle on the administration of justice in the fifty states, but we think there is a sound basis for concluding that the burden would not be insuperable or unjustifiably heavy. Generally speaking, the provision of counsel to a defendant is

not as expensive or as complicated as providing for a jury trial. The recommendations of the American Bar Association and the President's Commission on Law Enforcement and Administration of Justice, *supra,* that counsel be afforded in essentially the same circumstances as suggested here reflect a judgment by well qualified bodies made up of persons from all areas of the country and with a wide diversity of experience that counsel can feasibly be provided in these circumstances; on this score the recommendations are obviously entitled to considerable weight. As mentioned earlier, the issues in many petty offenses are relatively simple: was the accused publicly drunk? or engaging in prostitution? Counsel can give possibly valuable advice in such cases and even conduct a trial in much less time than appropriate representation would take for most serious felonies. And we see no reason to think that the advent of appointed counsel would significantly decrease the very high percentage of these cases disposed of by guilty pleas, given the simplicity of the issues and the continued high rate of guilty pleas for serious offenses in which counsel is now afforded as a matter of right. And, of course in many cases the right to counsel will be waived. Although each state differs, the supposition that states can afford to provide counsel in the cases suggested here is strongly supported by the fact that California, New York, Illinois, Massachusetts, Minnesota, New Hampshire and Texas already provide a right to appointed counsel in all or most cases in which incarceration is a realistic possibility (see Pet. Br. 14, 16, 19, 20, 22,

25–26; Brief of the Legal Aid Society of New York, Amicus Curiae, p. 2, note 1; Junker *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685, App. 732–734. The ability of the states to meet the expansions of the constitutional right to appointed counsel to all felony cases, to pretrial interrogation and line-up, and to appellate review probably implies a capacity to adjust to a further expansion of the right to counsel.

Although we are highly skeptical of the precision of statistical assessments of the impact of the proposed constitutional standard, we note that, based on the analysis of the Task Force Report on *The Courts,* pp. 55–56, of the President's Crime Commission, of the time of handling different kinds of cases, it has been estimated that the representation of all indigent misdemeanants, not including traffic violators, would require 1,575 to 2,300 full-time counsel (Note, *Dollars and Sense of an Expanded Right to Counsel,* 55 Iowa L. Rev. 1249, 1260–1261 (1970)). If counsel was provided only when imprisonment was likely, this figure obviously would be substantially reduced.[19] Viewed against the less than 5,000 lawyers in the country whom it is estimated take criminal cases more than occasionally (*id.* at 1259), this added burden would still be significant. However, it is much less so viewed against the country's estimated 342,935 attorneys, expected to double by 1985, and the 18,000

[19] Based on careful statistical analysis of areas where appointed counsel is afforded in misdemeanor cases, the brief for the National Legal Aid and Defense Association, Amicus Curiae, pp. 7–16, persuasively concludes that the burden on the bar of an extended right to counsel is much less than frequently supposed.

new admissions to the bar each year. See Ruud, *That Burgeoning Law School Enrollment,* 58 A.B.A.J. 146, 147. The problem raised by providing indigents facing imprisonment with counsel is not one of some absolute limit on monetary resources or legal talent that might preclude fulfillment of the right—indeed "the estimated 14,500 average annual openings [for lawyers] are significantly below the estimated new admissions to the Bar" (*id.* at 148). The problem, rather, is one involving an allocation of resources which is solvable if society expends sufficient resources to pay enough members of public defender or legal aid offices or to reimburse private appointed counsel, or instead spreads the responsibility of *gratis* representation broadly enough among members of the bar.

This problem raises what perhaps is the most troublesome practical aspect of extending the right to appointed counsel to petty offenses. Criminal defense lawyers are already overworked and the quality of representation is often deficient. The Task Force Report on *The Courts,* p. 32, commented:

> As has been noted, in many lower courts defense counsel are not provided for defendants without funds. In those places where counsel are assigned, frequently he is not compensated and often his performance is poor. A community gets the kind of legal service it pays for, and typically it pays little or nothing for defense counsel in its lower court.
>
> Attorneys operating regularly in these courts rarely appear in other courts. Often they seem to be more concerned with extracting a fee from their clients than with defending them.

> They operate on a mass production basis, relying on the plea of guilty to dispose of cases quickly. Frequently these lawyers are unprepared, make little contact with their clients, fail to investigate their backgrounds, and make little effort aside from the plea bargaining session to protect their interests or to secure a favorable disposition.

And where legal aid and public defender offices operate, a heavy caseload strains their ability to provide representation of the highest quality. It is conceivable that in some instances an expanded right to counsel would result in an even greater caseload that would force at least a temporary dilution in the quality of representation.

Although it would be unduly sanguine not to view this prospect with concern, we do not think it militates against holding that there is a constitutional right to appointed counsel for indigents who may be imprisoned. Most fundamentally, since the aid of counsel is an essential element of a fair criminal trial, it would be mistaken to reach a constitutional decision withholding the right to that assistance when it is feasible for society and the bar to provide it, solely because in some jurisdictions those responsible are not willing to allocate the necessary resources to make the right fully effective. The assumption must be that the other organs of government will respond to this Court's interpretation of what is constitutionally required, and that they will expend the necessary minimal resources. Whatever burden is imposed may be ameliorated if states and municipalities carefully

consider what offenses, or aggravated forms of offenses, really merit imprisonment, and draft their statutes and ordinances accordingly. And it may well be that the kind of representation required for certain petty offenses would not necessarily involve members of the Bar, but might be handled by law students or other trained personnel.

The problem raised by a decision extending counsel to petty offenses for which imprisonment may be imposed raises precisely the same kind of need in respect to the allocation of legal resources as other recent decisions expanding the right to counsel, which, so far as we are aware, have not caused any deterioration in the quality of representation. The conceivable possibility of that occurring did not preclude the Court from making decisions like *Gideon* v. *Wainwright, supra, Douglas* v. *California, supra,* and *United States* v. *Wade, supra;* nor, though on a national level the magnitude of the effect on the bar might be greater, do we think that possibility should preclude the Court from recognizing the right to counsel for indigents subject to imprisonment.

We recognize that the time spent by appointed lawyers on most petty offenses may not be very great; but frequently lawyers by giving advice about pleading guilty or consulting briefly with the prosecutor may give valuable assistance to an accused, and they may be in a position to forestall summary conviction of those defendants, perhaps comparatively few, against whom a serious miscarriage of justice might otherwise result. We are struck by the Task Force's conclusion *supra,* at p. 32, that even shoddy

representation is usually better than none at all, and we trust that most jurisdictions will work out representation much better than that described in the quoted portion of the Report. In any event, that better assistance might be provided in petty offenses cases would not be a proper ground for finding indigents not to be entitled to minimal assistance that would often be of considerable valuable.

In summary, recognizing that there will be troublesome practical aspects to effectuating the right, we suggest that the fundamental character of counsel's assistance for fair criminal trials should lead this Court to hold that there is a constitutional right to appointed counsel for indigents who may be sentenced to imprisonment.

CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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